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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL ANTHONY GARIBAY,

Defendant and Appellant.

B289440

(Los Angeles County
Super. Ct. No. VA142960)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed in part and remanded with directions.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Manuel Anthony Garibay appeals the judgment entered following a jury trial in which he was convicted of first degree murder (Pen. Code,¹ § 187, subd. (a)), with true findings on a gang enhancement allegation (§ 186.22, subd. (b)(1)(C)) and personal and principal firearm use allegations (§ 12022.53, subds. (b), (c) (d), & (e)(1)). The trial court imposed an aggregate sentence of 50 years to life, consisting of 25 years to life for the murder conviction, a consecutive term of 25 years to life for the firearm enhancement, and a suspended 10-year term for the gang enhancement.

Appellant contends the matter must be remanded for resentencing because the record shows the trial court was unaware of its discretion under Senate Bill No. 620² to strike the firearm enhancement in the interests of justice. Respondent concedes that the trial court appears to have been unaware of the change in the law, but maintains that remand is unnecessary because the court's comments clearly indicated it would not have stricken or dismissed the firearm enhancement if it had been aware of its discretion to do so. We find the trial court's comments at sentencing to be ambiguous, necessitating remand to afford the court an opportunity to exercise its discretion with respect to imposition of the gun enhancement in light of Senate Bill No. 620.

FACTUAL BACKGROUND

Around 1:40 in the afternoon on July 30, 2016, Raul Cervantes was fatally shot as he stood talking with another man

¹ Undesignated statutory references are to the Penal Code.

² Statutes 2017, chapter 682, section 2.

on the Gage Bridge in Bell Gardens. The shooter wore an oversized black hoodie and an LA Dodgers hat, which concealed his face. One witness saw the shooter run up the embankment and onto the bridge before shooting Cervantes in the side with what appeared to be a long-barreled rifle.

Officers recovered four expended .22 caliber long rifle casings, which could have been fired from a rifle or a handgun. A dog handler traced the shooter's path down the embankment, across Gage Avenue, and onto River Drive, where the shooter appeared to have fled in a car. Using surveillance video, police identified the car as a gray Nissan, which Jazmine N. had rented the day before from Hertz.

Jazmine lived with codefendant Salvador Franco in a house near the Gage Bridge. On July 30, 2016, Jazmine awoke to find Franco had taken the rental car. Jazmine called Franco, and he told her not to call him because he was "doing something right now." Later when she heard police activity on the Gage Bridge, Jazmine called Franco again, and this time he told her to meet him at a particular house on Vinevale Avenue, a Bell Gardens Locos gang hangout. When Jazmine arrived at the house Franco told her what had happened on the bridge. He sounded panicked and scared.

Appellant was arrested about a month after the shooting. While appellant was in custody, police placed a paid informant in appellant's cell, and their recorded conversation was played for the jury. Appellant told the informant he laid down in the seat of the car and his "homie" drove him to the spot where he got dropped off, and then he "did [his] thing." Appellant said he "got up on them" and "hit" "[b]oth of them" "[l]ike, 15 times." Appellant described the gun he used as "a big-ass rifle." After the shooting appellant ran across the street, jumped over the

guardrail, and ran down the embankment where his “homie” was waiting in the gray Nissan. Appellant hopped in the car and they took off.

Appellant told the informant he was wearing a black sweater with a hood and an “L.A.” hat that covered his face. Both appellant and Franco are admitted members of the Bell Gardens Locos criminal street gang. Appellant told the informant the victim was a member of the rival Walnut Street gang. When an officer walked Franco past appellant’s cell, appellant identified Franco to the informant as his “homie.”

Appellant’s and Franco’s phones’ cell tower usage around the time of the shooting was consistent with the movement of the gray Nissan seen in the surveillance videos near the Gage Bridge.

DISCUSSION

Remand Is Required to Enable the Trial Court to Exercise Its Discretion to Impose or Strike the Firearm Enhancement

The jury found true all three firearm enhancement allegations: that in the commission of the murder, appellant personally used a firearm (§ 12022.53, subd. (b)), he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and he personally and intentionally discharged a firearm proximately causing death (§ 12022.53, subd. (d)). Section 12022.53, subdivisions (b) and (c) provide for imposition of a consecutive term of imprisonment of 10 and 20 years, respectively, and subdivision (d) calls for imposition of a consecutive term of 25 years to life.

On October 11, 2017, the Governor signed Senate Bill No. 620. (2017–2018 Reg. Sess.) Previously, section 12022.53 required the imposition of specified sentencing enhancements based on a true finding that the defendant used a firearm in the

commission of a felony; the trial court had no discretion to strike an applicable enhancement. (§ 12022.53, subds. (b)–(d), (h).) The legislation amends section 12022.53, subdivision (h) to remove the prohibition on striking a firearm enhancement, and allows the court “in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section.” (Stats. 2017, ch. 682, § 2.)

On March 21, 2018, prior to appellant’s sentencing hearing in this case, the People filed two sentencing memoranda, one for each defendant. As to appellant, the People requested imposition of the consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d) for the firearm enhancement. The memorandum contained no mention of Senate Bill No. 620 or the trial court’s discretion with regard to imposition of the enhancement under amended section 12022.53, subdivision (h).

The trial court sentenced both appellant and his codefendant together on April 12, 2018. At the outset of the sentencing hearing, the trial court stated it had read the sentencing report and believed that the People’s sentencing recommendations were “not only appropriate,” but also “mandated by law.” The court pronounced Franco’s sentence first, and then proceeded to appellant’s sentence, which it noted was “also mandated by law.” As requested by the People, in sentencing appellant the court imposed the 25 years to life consecutive term under section 12022.53, subdivision (d).

The parties agree that the amendment to section 12022.53 applies retroactively to nonfinal judgments under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 745. And because the judgment of conviction in appellant’s case was not final when Senate Bill No. 620 took effect, appellant was entitled to the benefits of the

amendments to section 12022.53. But citing the court’s statement that it believed the People’s sentencing recommendations were “appropriate,” the Attorney General contends remand is not required here because the record shows the trial court would not have exercised discretion to strike the firearm enhancement. We disagree.

“ ‘[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Therefore, “unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so,” remand is required. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

The record of the sentencing hearing in this case contains no “clear indication” that if the trial court knew it had discretion with regard to imposition of the firearm enhancement it still would have imposed it. The prosecutor’s memorandum contained no reference to the court’s discretion, and the court’s vague statement that the People’s sentencing recommendations were “appropriate” is hardly an unambiguous statement of intent to impose the maximum sentence allowed regardless of any discretion to do otherwise. Given that the Legislature has expanded the field of “appropriate” sentences under section 12022.53, the trial court’s characterization of the proposed sentence as “appropriate” sheds no light whatsoever on how the

court would have exercised discretion it plainly did not know it had.

On this record, we cannot say that no reasonable court would strike the firearm enhancement, and we will not speculate as to how the trial court here might exercise its discretion. We therefore remand the matter to afford the trial court an opportunity to exercise its discretion to strike or impose the firearm enhancement in accordance with section 12022.53, subdivision (h).

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded with directions that the trial court exercise its discretion with respect to imposition of the firearm enhancement under Penal Code section 12022.53.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.